

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

MAY 13, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-2195-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**VIRGINIA WUSTRACK, Individually and as Special  
Administrator of the Estate of Walter Wustrack,**

**Plaintiffs-Appellants,**

**v.**

**BEVERLY ENTERPRISES-WISCONSIN, INC., d/b/a  
LAKEWOOD CARE CENTER,**

**Defendant-Respondent.**

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APPEAL from a judgment of the circuit court for Milwaukee County:  
PATRICK J. MADDEN, Reserve Judge. *Reversed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Virginia Wustrack appeals from the trial court's judgment dismissing her case for failure to prosecute. She argues that the trial court misused its discretion in dismissing the case. Pursuant to this court's order dated September 19, 1996, this case was submitted to the court on the expedited appeals

calendar. *See* § 809.17, STATS. Upon review of the briefs and record, we reverse the trial court's judgment.

Wustrack brought this action against the nursing home in which her husband resided before he died. She alleged that the nursing home breached its contract with her and her husband by failing to adequately care for him, that the nursing home was negligent in caring for her husband, and that the nursing home breached its fiduciary duty to her husband.

At a pretrial conference held July 5, 1995, the nursing home, Beverly Enterprises-Wisconsin, moved to bar special damages because no itemized list of damages had been served upon it. Beverly Enterprises further moved the trial court to direct Wustrack to elect a remedy in either tort or contract and to direct Wustrack to narrow her witness list, which at the time numbered 122. The trial court made several oral rulings and Beverly Enterprises agreed to reduce the trial court's oral order to written form. Beverly Enterprises filed the proposed order the day after the hearing. One day later, Wustrack objected to the language used in the proposed order. No further action was taken until a written order, reflecting some of the changes suggested by Wustrack, was entered by the court on January 8, 1996, over six months after the hearing.

Shortly after the order was entered, Beverly Enterprises moved to dismiss the case for Wustrack's failure to prosecute. Wustrack did not receive a copy of the order entered January 8, 1996, until she received the motion to dismiss. On January 29 and February 19, the trial court held hearings on the motion to dismiss and on a motion to compel discovery that Wustrack had previously brought. On May 31, 1996, the trial court issued a memorandum decision and subsequent order dismissing the case for failure to prosecute. The trial court stated that it dismissed this case because Wustrack had failed to comply with its oral pretrial order of July 5, 1995, and because she had failed to

provide an accurate list of witnesses and to interview potential witnesses after the point at which trial was originally to have commenced. The trial court concluded that this conduct was egregious and without clear and justifiable excuse.

The trial court has both statutory authority and inherent authority to sanction a party for failing to comply with procedural rules and for failing to obey court orders. *See* § 805.03, STATS.; *Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 273-74, 470 N.W.2d 859, 863 (1991). Where the noncomplying party's conduct is egregious and without "clear and justifiable excuse," the court may order dismissal as a sanction. *Johnson*, 162 Wis.2d at 276-77, 470 N.W.2d at 865. We review a trial court's decision to dismiss for an erroneous exercise of discretion. *Cf. Kerans v. Manion Outdoors Co., Inc.*, 167 Wis.2d 122, 130, 482 N.W.2d 110, 113 (Ct. App. 1992). "A court properly exercises its discretion if it examines relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach." *Id.*

We conclude that the trial court erroneously exercised its discretion in dismissing the case for failure to prosecute. Wustrack had a "clear and justifiable excuse" for not complying with the trial court's July 5 oral ruling. When Beverly Enterprises submitted a proposed written order to the court, Wustrack promptly objected to the order in writing, explaining her disagreement with it. Under these circumstances, Wustrack had a justifiable excuse for not complying with the oral ruling; the parties each interpreted the oral ruling differently. Indeed, the trial court characterized its oral ruling as "cloudy" during the course of the hearing. As explained by Wustrack's counsel, she was not attempting to "avoid compliance with the court's order, ... but legitimately believed that the proposed order drafted by defendant's counsel misinterpreted the court's oral order." Until the trial court entered a written order, Wustrack had no way of knowing which interpretation of the ruling was correct.

Similarly, we conclude that Wustrack had a justifiable excuse for not paring her witness list more substantially and for not interviewing the witnesses earlier. Within several weeks of entry of the written order, Wustrack pared her witness list by over fifty percent, even though the trial court had not specified to what extent it expected her to reduce the list. Absent more specific direction from the trial court, Wustrack adequately complied with the trial court's order by reducing her witness list by fifty percent. As for her decision not to interview the witnesses earlier, Wustrack explained at the July 5 hearing that she was uncertain which of the witnesses might be managers for the defending corporation. Under SCR 20:4.2, "a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The comment to the rule explains that communications by a lawyer for one party with persons having a managerial responsibility on behalf of the defendant organization are prohibited, as are communications with any other person whose act or omission in connection with the matter may be imputed to the organization for purposes of civil liability. *See Niesig v. Team I*, 558 N.E.2d 1030, 1032 (N.Y. 1990). In light of Wustrack's appropriate concern about which witnesses she could interview, she did not act "outrageously" in not interviewing the witnesses before the initial trial date which had since been adjourned.<sup>1</sup>

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<sup>1</sup> Part of the trial court's confusion might have stemmed from the following assertion in the affidavit submitted to it by L. William Staudenmaier, the attorney for the nursing home, in support of the nursing home's motion to dismiss:

On July 5, 1995, following a last minute motion by plaintiff's counsel that succeeded in derailing the July 17, 1995 trial date, this Court conducted a pre-trial conference, as requested by plaintiff.

(Emphasis added.) This statement might have led the trial court to conclude that the "derail[ment]" of the July 17, 1995, trial date was the fault of plaintiff's counsel. It was not.

(continued)

*By the Court.*—Judgment reversed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

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On June 29, 1995, plaintiff filed a motion with the trial court to strike two expert witnesses from the nursing home’s witness list because defense counsel reneged on an agreement to identify its expert witnesses by September 15, 1994, and did not identify two persons whom he termed “independently retained experts” until June 16, 1995. The trial court denied the motion to strike the expert witnesses, and indicated that the trial date would be adjourned if the expert witnesses could not be deposed prior to the trial as then scheduled. By letter dated July 6, 1995, defense counsel notified the trial court that “efforts to produce” the expert witnesses for depositions prior to the scheduled trial date “were fruitless” because both of them “will be out of state.” The trial was then adjourned.

Although lawyers necessarily clothe the facts of any case with spins favorable to their clients, in our view Mr. Staudenmaier stretched advocacy beyond appropriate limits by placing blame on plaintiffs’ counsel for the trial’s adjournment.



